IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BROOKSIDE LIMITED PARTNERSHIP,

Petitioner,

vs.

THE UNITED STATES,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI

UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI

KENNETH W. BEHREND
BEHREND, ARONSON AND
MORROW
Attorneys for Petitioner
1112 Frick Building
Pittsburgh PA 15219

(412) 391-2515

QUESTIONS PRESENTED

1. Is there an unstated exception to the law of contracts which provides that HUD need not be treated as a contracting party and bound by the conditions of contracts into which it has entered with private parties?

2. Has the concept of "arbitrary and capricious" entered somehow into the concept of HUD's contractual responsibilities so that no contract will ever be interpreted contrary to the interest of HUD unless HUD's interpretation of the contract is so egregious as to be thought to be arbitrary and capricious?

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STATUTES

Reference to Reports of Opinions Delivered in the Courts Below

The opinion of the Court below filed September 3, 1982, and not yet reported is reprinted in the Appendix hereto.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. § 1255, from an Order and Judgment entered September 3, 1982. This is a case in the Court of Claims that may be reviewed by the Supreme Court by Writ of Certiorari granted on Petition of the claimant.

Statutory Provisions Involved

12 U.S.C.A. § 1715 (b).

(b) The secretary is authorized, upon application by the mortgagee, to insured under this section as hereinafter provided in a mortgage... which is eligible for insurance as provided

herein and, upon such terms and conditions as the secretary may prescribe, to make commitments for the insurance of such mortgages prior to the date of their execution or dispersment thereon.

Statement of the Case

This is an action brought by an owner-developer-mortgagor of a federally unsubsidized section 221 (d) (4), multi-family project based on the defendant's breach of an implied-in-fact covenant. For convenience, owner-developer-mortagor is designated hereinafter as O-D-M.

An existing contractual relationship between HUD and the O-D-M was found by the Court below.

Such a contractual relationship is authorized by statute, 12 USC 1715. Therein, the Secretary is authorized to insure a mortgage eligible for insurance and to make commitments for insurance of such

mortgages under such terms and conditions as the Secretary may prescribe.

The O-D-M contends that an implied-in-fact covenant of the contractual relationship is that HUD was to conduct inspection of construction for the benefit and protection of the O-D-M for which payment of $13,670.00 was specifically required. The O-D-M asserts that HUD breached its covenant of inspection for which the O-D-M paid $13,670.00.

There is more than one document that contributes to the contractual relationship between HUD and O-D-M. However, nowhere among them is there a document signed by HUD and O-D-M describing the inspection

responsibilities of HUD to O-D-M or the amount of money to be paid for them by O-D-M. It is acknowledged that HUD did make inspections of construction and that O-D-M did pay to HUD $13,670.00 for the inspections. It is not disputed that with each inspection of construction by HUD, HUD demanded and received a portion of the $13,670.00.

On a printed form supplied by HUD with the blanks and filed according to HUD's direction, the construction contractor, one Monal Construction Company and L-B Building Co., a joint venture, gave authority to HUD to enter on to the construction site and to interpret Contract Documents and to determine

construction compliance therewith. This form signed by the construction contractor and O-D-M became the construction agreement and was entitled by HUD: CONSTRUCTION CONTRACT - COST PLUS.

This same form, known as FHA Form No. 2442A also, required the construction contractor to give to HUD the right to have payments made or payments withheld according to whether work was acceptably completed as determined by HUD's inspection of construction.

The two provisions of the CONSTRUCTION CONTRACT - COST PLUS referred to above are:

Article 8 - Right of Entry
and Interpretation

A. The Lender and its agents or assigns and the Commissioner and his agents shall, at all times during construction, have the right of entry and free access to the project and the right to inspect all work done and materials, equipment and fixtures, furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish each enclosed working space as the Lender or Commissioner may require and find acceptable as to location, size, accommodations and furnishings.

B. The Commissioner shall also have the right to interpret the Contract Documents and to determine compliance therewith.

and,

Article 3 - Payments

B. Each month after the commencement of work hereunder, the Constractor shall make a monthly request for payment (in quadruplicate on FHA Form No. 2448) by the Owner for work done during the preceding month. Each request for payment shall be filed at least ten (10) days before the date payment is desired. Subject to the approval of the Lender and the Commissioner, the Contractor shall be entitled to payment thereon in an amount equal

to (1) the total value of classes of the work acceptably completed; plus(2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (3) 10 percent holdback and less prior payments. . . .

What effect does this absence of a written covenant between HUD and O-D-M have on the responsibility of HUD to O-D-M for the money paid for inspection? What effect does the CONSTRUCTION CONTRACT - COST PLUS have on the construction and interpretation of this unwritten understanding?

It is submitted that the written contract between HUD and O-D-M is silent as to the responsibility and duty of HUD to O-D-M in the making of inspection of construction.

It is submitted that the written contract between HUD and O-D-M is silent as to the responsibility and duty of O-D-M to HUD to make payment for HUD's inspection of construction.

It is submitted that there is an understanding between HUD and O-D-M as to their respective rights and liabilities with respect to performance of inspection and payment. Our task is to discover by contractual interpretation based on the reorganized rules of construction of contracts what is the understanding to be enforced.

The silence of the contractual relationship in any document executed by HUD and O-D-M creates an obvious ambiguity. One reasonable

interpretation of this ambiguity is that HUD performed the inspections for its benefit and protection and for the benefit and protection of O-D-M.

Money was paid for the inspection service by O-D-M and the HUD supplied and completed form, CONSTRUCTION CONTRACT - COST PLUS, gives from the construction contractor the authority to HUD to protect and benefit those who will benefit by proper construction. Namely; HUD, the lender, the future tenants and O-D-M.

There is no expressed or implied limitation in any of the documents signed by HUD and O-D-M that in any way diminishes the

benefit and protection to O-D-M of the HUD inspection of construction.

Since HUD is the document creator and preparer, ambiguity must be construed against HUD and in favor of O-D-M.

In opposition to this contract construction, HUD offers the language of an agreement between HUD and Mellon Bank. This is an agreement to which O-D-M is not a party. HUD offers from the agreement with Mellon Bank the following language to limit its responsibility to O-D-M:

> "5(b) during the course of construction, the commissioner and his representatives shall at all times have access to the property and the right to inspect the progress of construction, and an inspection fee in the amount of $13,670.00 shall be paid upon the initial insurance

endorsement of the mortgage note. The inspection of construction by a representative of the commissioner shall be only for the benefit and protection of the secretary of Housing and Urban Development". (emphasis added)

This offered limitation on O-D-M's contractual rights against HUD is, for lack of a better designation, called by us a "third party detriment contract".

The lower court used the language in this "third party detriment contract" to rule in favor of HUD and dismiss O-D-M's claim in the summary judgment proceeding brought by HUD.

It was expected by conventional rules for the construction of contracts the court

below would find that a motion for summary judgment in favor of HUD was to be denied. It was expected that unquestionably HUD would have to prove something in addition to what it had asserted to prevail at trial.

We can only speculate what may have influenced the court to ignore the rules of contract construction to find in favor of HUD. Our rationalization for the finding of the lower court comes from the "slip" in the opinion, almost Freudian in nature. At page 7 of its opinion, the court discusses a paper of agreement called "Regulatory Agreement". This actually is no more than a contract containing contractual conditions

and words of agreement. However, the court speaks of these conditions as regulations. These conditions are not to be found in the Code of Federal Regulations.

We suggest that the lower court in reaching it decision has found a new public policy as the foundation upon which its reasoning rests. This policy can be stated that HUD is to be judged as if it were a regulatory agency. Even with respect to its own contracts the interpretation by HUD will be supported if the interpretation is reasonable and not arbitrary or capricious.

There is no need to point out the enormity of effect on numerous citizens such a public policy of

ignoring contract law or any part of the law because HUD is a party. We sincerely believe our analysis of the lower court's decision is correct. We sincerely believe this is a good time and adequate vehicle to restrain unnecessary and, therefore, unhealthy obeisance to HUD or any other Department or Bureau.

It is the appropriate time to stop a nascent public policy of ignoring recognized law and favoring the government over its citizens.

This Court should take the opportunity to rule on whether it is proper policy for HUD to be treated as a regulatory agency so that it may freely interpret its own contracts.

Lower Court Jurisdiction

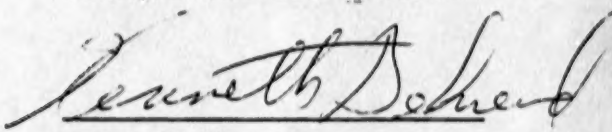
The jurisdiction of the Court of Claims was involved under 28 U.S.C.A. 1491, as to a claim against the United States founded upon an expressed or implied contract with the United States.

Petitioner's Arguement for Allowance of the Writ

HUD is not a regulatory agency. A hearing of the case will give Your Honorable Court the opportunity to characterize HUD's regulatory status. It will also deter agencies of the Executive branch and creations of the Legislature from encroachments on the law. It will encourage respect and observance of our law.

For these reasons, the Petition for Writ of Certiorari should be granded.

Respectfully submitted,
BEHREND ARONSON & MORROW



Kenneth W. Behrend
Attorney for Petitioner
1112 Frick Building
Pittsburgh, Pa. 15219
(412) 391-2515

IN THE UNITED STATES COURT OF CLAIMS

No. 224-81C

THE BROOKSIDE LIMITED PARTNERSHIP	)	HUD; Inspection of Housing Project for Benefit of Developer; Implied-in-Fact Contract
v.	)	
THE UNITED STATES	)	

Kenneth W. Behrend, attorney of record, for plaintiff. Daniel W. Ernsberger and Behrend, Aronson & Morrow, of counsel.

Glenn E. Harris, with whom was Assistant Attorney General J. Paul McGrath, for defendant. John P. Kennedy and Gerald H. Salzman, Department of Housing and Urban Development, of counsel.

Before KASHIWA, BENNETT, and SMITH, Judges

O R D E R

Plaintiff claims that the Department of Housing and Urban Development (HUD) entered into an agreement with plaintiff, drawn from several documents, oral understandings, and the parties' conduct,

whereby plaintiff would pay HUD an inspection fee and HUD would inspect for plaintiff's benefit the construction of plaintiff's housing project. Plaintiff further claims that HUD failed properly to inspect the project and that therefore the project was shoddily constructed. Plaintiff petitions the court for a monetary award as compensation for the damage it has incurred.

Defendant claims that HUD did not enter into any agreement with plaintiff to inspect the project for plaintiff's benefit. Defendant claims that the document which contains the reference to inspection of the project and to the inspection fee was between HUD and the mortgagee, not between HUD and plaintiff. Defendant further contends that HUD inspected the project only in order to protect HUD's commitment to insure plaintiff's mortgage. Defendant claims that the inspection fee charged

was a cost of the mortgage insurance and not, as plaintiff claims, compensation for guaranteeing that the project was properly constructed. Defendant concludes that since there is no contract between it and plaintiff and since, according to defendant, there is no implied-in-fact agreement between the parties whereby defendant obligated itself to inspect the project for the benefit of plaintiff, the court lacks subject matter jurisdiction over plaintiff's claim.

Defendant moves for summary judgment and plaintiff has cross-moved for partial summary judgment.1/ We hold that no

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1/ After the case was fully briefed and submitted on defendant's motion for summary judgment, plaintiff moved for leave to file its cross-motion for partial summary judgment out of time, accompanied by its cross-motion and a supporting brief. The court grants plaintiff's motion for leave to file the proferred documents and has fully considered them in rendering its determination.

contract over which we have jurisdiction was created between plaintiff and defendant that obligated defendant to inspect the project for the benefit of plaintiff.

On June 16, 1977, plaintiff and HUD entered into an agreement whereby HUD committed itself under the provisions of section 221(d)(4) of the National Housing Act to insure plaintiff's mortgage obligation. The agreement was contingent, in part, upon HUD's review and approval of (1) the project mortgage, (2) the project construction contract, and (3) the project architect agreement. Plaintiff obtained a mortgage for its project, Brookside Apartments, Beaver Falls, Pennsylvania, from Mellon Bank, Pittsburgh, Pennsylvania. Plaintiff entered into a construction contract on October 17, 1977, with a joint venture construction company, Monal Construction Company and L-D Building Company.

Plaintiff's claim that HUD agreed to inspect the project for plaintiff's benefit relies on three contract provisions. The firs two provisions are part of the mortgage commitment agreement between HUD and the mortgagee, Mellon Bank. Paragragh 3(c) of that agreement states that HUD has the right of approval over the construction contract. Paragraph 5(b) states that:

> During the course of construction, the Commissioner and his representatives shall at all times have access to the property and the right to inspect the progress of construction, and an inspection fee in the amount of $13,670 shall be paid upon the initial insurance endorsement of the mortgage of the mortgage note. The inspection of construction by a representative of the Commissioner shall be only for the benefit and protection of the Secretary of Housing and Urban Development.

The third provision is article 3-B of the construction contract between plaintiff and the construction company. That article section states, in part,

> B. Each month after the commencement of work hereunder, the Contractor shall make a monthly request for pay-

> ment * * * by the Owner for work done during the preceding month. Each request for payment shall be filed at least ten (10) days before the date payment is desired. Subject to the approval of the Lender and the Commissioner, the Contractor shall be entitled to payment thereon ***.

Plaintiff concludes that HUD's right to approve the construction contract linked with HUD's inspection privileges and its right of approval over payments to the contractor created an implied-in-fact contract between defendant and plaintiff whereby HUD obligated itself to inspect the project for the benefit of plaintiff. In other words, plaintiff argues that HUD was responsible to protect plaintiff's interest in the project being properly constructed because (1) all the relevant documents used in the development of the project were HUD-drafted forms, (2) HUD had the right of approval over all payments of funds to the contractor (3) HUD inspected the project to see that it com-

plied with the construction contract, and (4) plaintiff was not empowered with the authroity to withhold funds from the contractor as a penalty for poor workmanship.

Because the case is presented on us on motions for summary judgment, we must examine the facts presented in the light most favorable to each non-moving party. In plaintiff's cross-motion, we are asked to find that the parties had entered into an agreement; that the insurance commitment between defendant and the mortgagee is evidence of the agreement between defendant and plaintiff; that defendant had full authority to draft the construction contract; that the construction contract gave defendant the exclusive authority to inspect the project and to distribute funds to the contractor; and that the exclusive nature of HUD's authority to inspect and distribute funds implies the inspection was for plaintiff's benefit.

We decline to make such findings however. First, the agreements give both the mortgagee and HUD the right to inspect the project and the right to approve the payment of funds to the contractor. HUD's authority was not exclusive. Second, defendant points out that the insurance commitment only defined the relationship between HUD and the mortgagee. Plaintiff claims that the insurance commitment is evidence of the agreement between it and defendant with respect to provisions which are to plaintiff's advantage, but claims that the same document is not relevant to the case with respect to provisions that are adverse to plaintiff. If the commitment is a part of the agreement which plaintiff argues exists between the parties, the entire document must beconsidered. Third, plaintiff makes

ambiguous references to certain oral understandings between it and HUD. However, in response to defendant's demand for particu-

larization of these understandings, plaintiff cnly cites oral statements which were later incorporated in one of the documents in question. We therefore find that there are no oral understnadings which are outside of or are in conflict with the terms of the documents. In view of these facts, we cannot grant plaintiff's cross-motion.

Defendant's motion presents issues which, viewed in terms most favorable to plaintiff, can be resolved by the court without further proceedings. The program under which plaintiff's mortgage was insured follows a general pattern of procedures. The prospective lender, here the Mellon Bank, submits to HUD an "Application for Mortgage Note Insurance." The developer, plaintiff, at the same time submits to HUD a detailed statement about the proposed project. HUD reviews these documents and, if the project warrants, enters into a "Commitment to Insure" with the mortgagee. The "Commitment" delineates the obliga-

tions between the parties to the agreement, HUD and the mortgagee. In the present case, HUD obligated itself to "endorse for insurance * * * a mortgage note." The balance of the Commitment details what must be done for HUD to be so obligated. The requirements include providing HUD with copies of the mortgage and the construction contract for its approval. They also in-

clude the requirement in paragraph 5(b), supra, that HUD have access to the project for inspection. Finally, the owner/developer of the project must enter into a "Regulatory Agreement" with HUD whereby the owner/developer agrees to comply with certain HUD regulations concerning the operation of the project after it is completed.

In order for an implied-in-fact contract to be created, there must be a meeting of the minds which is inferred from the conduct of the parties. However, the "evidence" which plaintiff cits does not indi-

cate that such a meeting or minds took place between it and defendant. Defendant and plaintiff are not both parties to any of the written agreements which plaintiff claims are evidence of an agreement between defendant and plaintiff. Nothing in the agreements indicates that defendant obligated itself to protect plaintiff's interest in the project being properly constructed. In fact, the agreement which specifically refers to HUD's right of inspection, and the inspection fee, states that the inspection was "only for the benefit and protection of the Secretary of Housing and Urban Development."1/ While this clause is contained in an agreement between HUD and the mortgagee, it is evidence of HUD's intention to make clear that it was not obligating itself to inspect the project for the benefit of any other entity.

1/ Cf. United States v. Neustadt, 366 U.S. 696, 708-10 & n.24 (1961) (FHA appraisal of home for purposes of guaranteeing mortgage pursuant to § 266 of the National Housing Act is for the protection of the

Government, not the buyer, and does not give rise to a claim under the Federal Tort Claims Act).

As stated above, the construction contract between plaintiff and the construction company gives the mortgagee and HUD jointly the right to approve the payment. It is common practice for construction mortgagees to have control over the purse strings and again there is no indication that defendant's right of approval has any other purpose than protection of defendant. The contract does not indicate that plaintiff is itself unable to inspect the project and report construction flaws to the mortgagee in order that they be corrected. Plaintiff is further protected from defects in workmanship by article 6 of the construction contract which requires the contractor to furnish plaintiff a performance bond against which plaintiff can make claims for the contractor's failure to complete the contracted work.

The present case is easily distinguishable from the two cases plaintiff relies upon for defendant's obligation. Paccon, Inc. v. United States, 185 Ct. Cl. 24, 399 F.2d 162 (1968), concerned a construction contract between the Government and a building contractor. In Paccon, there was an express contract between the Government and that plaintiff, which the court interpreted. The instant case does not concern an express contract and the court's interpretation of the express conditions of a particular contract has little value as precedent.

The second case, Somali Development Bank v. United States, 205 Ct. Cl. 741, 508 F.2d 817 (1974), involved an agreement between the Government and that plaintiff for a loan to that plaintiff to be used for the development of businesses in Somali. The court held that the petition raised a claim that sounded in tort and was therefore

outside our jurisdiction. The court held that the petition raised a claim that sounded in tort and was therefore outside our jurisdiction. The court rejected that plaintiff's contention that there was an implied-in-fact contract created whereby defendant guaranteed the success of the plaintiff's enterprise when the Government loaned funds to that plaintiff. Instead the court held that such a warranty is not implied in the part of defendant "where the warranty is not expressly provided for in a statute of contract." Id., 205 Ct. Cl. at 751, 508 F.2d at 822. Somali offers the present plaintiff no grounds upon which to base its claim.

Plaintiff has offered no evidence which would indicate that a "meeting of the minds" took place between it and defendant whereby defendant obligated itself to inspect the workmanship of the construction of the project for plaintiff's benefit. There is

nothing to indicate that the inspection fee was anything more than a cost of obtaining the mortgage insurance. Certainly nothing in the statute or regulations governing the transaction empowers defendant to enter into an arrangement such as plaintiff envisions. This is strong evidence that defendant never intended to engage in inspecting the project for plaintiff's benefit. While plaintiff may have been harmed by the poor workmanship, no evidence has been presented which would indicate a breach by defendant of an express or implied-in-fact contract -- the only contracts over which we have jurisdiction.

When the party moving for summary judgment makes out a convincing showing that no genuine issues of fact remain, the burden is upon the other party to demonstrate adequately by receivable facts that a real, not a formal, controversy exists. See Mandalay Shores Co-op Housing Ass'n v.

Pierce, 667 F.2d 1195 (5th Cir. 1982). Plaintiff has failed to meet that burden.

IT IS THEREFORE ORDERED that plaintiff's motion for leave to file its cross-motion for partial summary judgment out-of-time is granted. Without hearing oral argument, and after carefully considering all the submissions, we grant defendant's motion for summary judgment, deny plaintiff's cross-motion for partial summary judgment, and dismiss the petition.

BY THE COURT

Edward S. Smith
Judge

SEP 3 1982

FHA FORM 2442A
(Rev. 5/69)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION

CONTRUCTION CONTRACT--COST PLUS

THIS AGREEMENT, made the 17th day of October, 1977, by and between MONAL CONSTRUCTION COMPANY and L-D BUILDING CO. a joint venture (hereinafter called the "Contractor") and BROOKSIDE LIMITED PARTNERSHIP (hereinafter called the "Owner").

WITNESSETH, That the Contractor and the Owner, for the consideration hereinafter set out, agree as follows:

Article I - Scope of Contract

A. The Contract between the parties is set forth in the "Contract Documents", which consist of this Agreement, the Drawings and Specifications, to which are attached the current edition of AIA Document A201, "General Conditions of the Contract for

Construction", and FHA Form No. 2554, "Supplementary Conditions of the Contract for Construction". The provisions of this instrument and the said FHA Supplementary Conditions take precedence over all inconsistent provisions in the said AIA General Conditions. Any provision in said AIA General Conditions whereby the undersigned waive all rights against each other for damages caused by fire and other perils covered by insurance shall be inapplicable. This Contract constitutes the entire agreement between the parties, and any previously existing contract concerning the work contemplated by the Contract Documents is hereby revoked.

B. The Contractor shall furnish all of the materials and perform all of the work (within the property lines) shown on, and in accordance with, the Drawings and Specifications entitled FHA Project No. 033-35061-LDC, dated October 26, 1976,

as amended.

C. The Drawings, which are numbered 1 through 15, and the Specifications, the pages of which are number sheet 1 of 1 on have been prepared by Jamrom-Keegan, Architects starting with Addendum number four through page 16-24. The Architect administering the Construction Contract (hereinafter, and elsewhere in the Contract Documents, referred to as the "Architect"0 is Leonard Perfido.

D. A master set of said Drawings and Specifications, identified by the -parties hereto and by the Design Architect, the Architect, and the Contractor's surety of Guarantor have been placed on filed with the Federal Housing Commissioner (hereinafter referred to as the "Commissioner"), and shall govern in all matters which arise with respect to such Drawings and Specifications.

E. Changes in the Drawings and Specifications or any terms of the Contract Documents, or orders for extra work, or changes by altering or adding to the work, which will result in any net construction cost increase, or will change the design concept, or which will result in a net cumulative construction cost decrease of more than 2% of the contract amount may be effected only with the prior written approval of the Owner's Lender (more particularly identified below and hereinafter referred to as the "Lender") and the Commissioner and under such conditions as either the Lender or the Commissioner may establish.

Article 2 - Time

A. The work to be performed under this Contract shall be commenced on or before October 20, 1977, and shall be completed by September 20, 1978. The time by which the work shall be completed may

be extended in accordance with the terms of the said AIA General Conditions only with the prior written approval of the Commissioner.

B. The Contractor shall correct any defects due to faulty materials of workmanship which appear within one year from the date of substantial completion.

C. If the work is not substantially completed in accordance with the Drawings and Specifications, including any authorized changes, by the date specified above, or by such date to which the contract time may be extended, the maximum sum slated in Article 3A(1) below shall be reduced by $984.24 as liquidated damages, for each day of delay until the date of substantial completion. The total of any such liquidated damages shall be reduced by an amount equal to the project's net operating income (as defined and determined by the Commissioner) for

the period upon which liquidated damages based.

D. The date of substantial completion shall be the date the FHA Cheif Underwriter signs the final Project Inspection Report (FHA Form No. 2449).

Article 3 - Payments

A. (1) Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

(a) The actual cost of construction as defined in Article 10 below; plus

(b) A fee of $248,570.00.

In no event, however, shall the total cash payable pursuant to this paragraph (1) exceed $2,671,692.00 plus all income received by Mellon Bank from all escrowed moneys deposited with Mellon Bank in the Brookside Limited Partnership special account (less bank service charges and other bank fees resulting from the

investment of said moneys), said income not to exceed $14,821.00.

(3) If, upon completion, the Contractor shall have received cash payments in excess of (a) the actual cost of construction, plus (b) the cash fee specified in paragraph (1), plus the additional amount to be paid under the provisions of paragraph (3), all such excess shall be refunded to the Owner.

B. Each month after the commencement of work hereunder, the Contractor shall make a monthly request for payment (in quadruplicate on FHA Form No. 2448) by the Owner for work done during the preceeding month. Each request for payment shall be filed at least ten (10) days before the date payment is desired. Subject to the approval of the Lender and the Commissioner, the Contractor shall be entitled to payment thereon in an amount equal to (1) the total value of classes

of the work acceptably completed; plus (2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (3) 10 percent holdback and less prior payments. The "values" of both (1) and (2) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown", attached hereto as Exhibit "A". The Contractor agrees that no materials or equipment required by the Specifications will be purchased under a conditional sale contract or with use of any security agreement or other vendor's title or lien retention instrument.

B.2. See addendum attached.

C. The balance due the Contractor hereunder shall be payable upon the expiration of 30 days after the work hereunder is fully completed, provided the following have occurred:

(1) All work hereunder requiring inspection by municipal or other governmental authorities having jurisdiction has been inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction;

(2) All certificates of occupancy, or other approvals, with respect to all units of the project have been issued by the State or local governmental authorities having jurisdiction; and

(3) Permissions to occupy (FHA Form No. 2485) for all units of the project have been issued by the Commissioner.

D. With its final application for payment by the Owner, the Contractor shall disclose, on a form prescribed by the Commissioner, all unpaid obligations contracted in connection with the work

performed under this Contract. The Contractor agrees that within 15 days following receipt of final payment, it will pay such obligations in cash and furnish satisfactory evidence of such payment to the Owner.

Article 4 - Receipts & Releases of Liens

The Owner may require the Contractor to attach to each request for payment its acknowledgement of payment and all subcontractors' and materialmen's acknowledgements of payment for work done and materials, equipment and fixtures furnished through the date covered by the previous payment. Concurrently with the final payment, the Owner may require the Contractor to execute a waiver or release of lien for all work performed and materials furnished hereunder, and may require the Contractor to obtain similar waivers or releases from all subcontractors and materialmen.

Article 5 - Requirements of Contractor

A. The Contractor shall furnish, at its own expense, all building and other permits, licenses, tools, equipment and temporary structures necessary for the construction of the project.* The Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and rpotective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Contractor further shall comply with the provisions of the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America. The Contractor shall immediately notify the Commissioner of the delivery of all permits, licenses, certificates of inspection, certificates of occupancy, and any other such certificates and instruments

required by law, regardless of to whom issued, and shall cause them to be displayed to the Commissioner upon his request.

*except owner shall be required to pay all tap-in fees required by any governmental or municipal authority.

B. If the Contractor observes that the Drawings and Specifications are at variance with any applicable codes, laws, ordinances, rules or regulations, or protective covenants, it shall promptly notify the Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications. If the Contractor performs any work knowing it to be contrary to such codes, laws, ordinances, rules or regulations, or protective covenants, wihtout giving such notice to the Architect, shall bear all costs arising therefrom.

C. Upon completion of construction, the Constractor shall furnish to the owner a survey showing the location on the site of all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements. Such survey shall be prepared by a licensed surveyor who shall certify that the work is installed and erected entirely upon the land covered by the mortgage and within any building restriction lines on said land, and does not overhang or otherwiese encroach upon any easement or right-of-way of others. In addition, if the Owner shall so require, the Contractor shall furnish a survey with each application for payment for any improvements, including structures and utilities, not theretofore located on a survey.

D. The Contractor shall assume full responsibility for the maintenance of all landscaping which may be required by the Drawings and Specifications until such a time as both parties to this Contract shall receive written notice from the Commissioner that such landscaping has been finally completed. The Owner hereby agrees to make available to the Contractor, for such purpose, wihtout cost to the latter, such facilities as water, hose and sprinkler.

Article 6 - Assurance of Completion

The Contractor shall furnish to the Owner assurance of completion of the work in the form of a performance bond which shall include a rider in favor of the Township of White in the amount of $50,000.00 to assure said township that if the condition of 26th Avenue in said township deteriorates because of construction or construction vehicles passing upon it,

said road shall be restored to its condition at the commencement of work. Such assurance of completion shall run to the Owner and the Lender as obligees and shall contain a provision whereby the surety agrees that any claim or right of action that either the Owner or the Lender might have thereunder may be assigned to the Commissioner.

The Contractor shall file no mechanic's or materialman's lien or maintain any claim against the Owner's real estate or improvements for or on accoutn of any work done, labor performed or materials furnished under this contract.

Article 8 - Right of Entry and Interpretation

A. The Lender and its agents or assigns and the Commissioner and his agents shall, at all times during construction, have the right of entry and free access to the project and the right to

inspect all work done and materials, equipment and fixtures furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish such enclosed working space as the Lender or Commissioner may require and find acceptable as to location, size, accommodations and furnishings.

B. The Commissioner shall also have the right to interpret the Contract Documents and to determine compliance therewith.

Article 9 - Assignments, Subcontracts and Termination

A. This contract shall not be assignable by either party without the prior written consent of the other party, the Lender and the Commissioner, except that the Owner may assign the Contract, or any rights hereunder, to the Lender or the Commissioner.

B. The Contractor shall not subcontract all of the work to be performed hereunder without the prior written consent of the Owner, the Lender and the Commissioner.

C. Upon request by the Owner, the Lender or the Commissioner, the Contractor shall disclose the names of all persons with whom it has contracted or will contract with respect to work to be done and materials and equipment to be furnished hereunder.

D. The Contractor understands that the work under this contract is to be financed by a building loan to be secured by a mortgage and insured by the Commissioner, and that the terms of said loan are set forth in a Building Loan Agreement between the Owner as Borrower and ... as Lender. The Contractor further understands that said Building Loan Agreement provides that, in event of

the failure of the Owner to perform its obligations to the Lender thereunder, the Lender may, as attorney-in-fact for the Owner, undertake the completion of the project in accordance with this Contract. In the event the Lender elects not to undertake such completion, the Contractor's obligations under this contract shall terminate.

Article 10 - Certification of Actual Cost

A. The "actual cost of construction", as used in Article 3 above, shall include all items of cost and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen's compensation insurance, social security, public liability insurance, job overhead and other expenses directly connected with construction, and including general overhead expenses, but excluding kick-backs, rebates or discounts received or receivable in connection with the

construction of the project; and excluding any return on or cost of the Contractor's working capital, such return on or cost of working capital being as part of or to be paid from the Contractor's fee or profit.

B. The Contractor shall keep accurate records of account of the said actual cost of construction, and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the project available for inspection by inspection by the Owner and the Commissioner.

C. With its final application for payment, the Contractor shall furnish to the Owner a completed "Contractor's Certificate of Actual Cost", which shall be accompanied and supported by an independent public accountant's certificate as to the actual cost (in form acceptable to the Commissioner).

D. The Contractor shall include in all subcontracts, equipment leases and puchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the project, in the event the Commissioner determines there is an identity of interest between either the Owner or the Contractor and any such subcontractor, equipment lessor or supplier.

WITNESS the hands and seals of the parties at Pittsburgh, Pennsylvania, the date above written.

WITNESS:

THE BROOKSIDE LIMITED PARTNERSHIP

_____ By _____ (SEAL)
General Partner

_____ By _____ (SEAL)
General Partner

_____ By _____ (SEAL)
General Partner

ATTEST:

MONAL CONSTRUCTION COMPANY and L-D BUILDING CO., joint venture

By_____
Frank Poerior,
Monal Construction

By_____
John M. Ridilla,
L-D Building Co.

FHA FORM NO. 2444
Revised November 1969
(Previous Revision Obselete)

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

FEDERAL HOUSING ADMINISTRATION

REGULATORY AGREEMENT FOR
MULTI-FAMILY HOUSING PROJECTS
(Under Sections 207, 220
221(d)(4), 231 and 232,
Except Nonprofits)

Project No. 033-35061 - LDC

Mortgagee Mellon Bank, N.A.

Amount of Mortgage Note $2,734,000.00

Mortgage:Recorded:

State - Pennsylvania County - Beaver

Book Page

Date August 31, 1977

Originally endorsed for insurance
under Section 221(d)(4)

This Agreement entered into this 31st day of August, 1977, between Brookside Limited Partnership whose address is 3003 21st Avenue, Beaver Falls, Pennsylvania 15010 its successors, and assigns (jointly

and severally, hereinafter referrred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors (hereinafter referred to as Secretary).

In consideration of the endorsement of insurance by the Secretary of the above described note or in consideration of the consent of the Secretary to the transfer of the mortgaged property or the sale and conveyance of the mortgaged property by the Secretary, and in order to comply with the requirements of the National Housing Act, as amended and the Regulations adopted by the Secretary pursuant thereto, Owners agree for themselves, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Secretary shall be the owner, holder or reinsurer of the mortgage, or during say time the Secre-

tary shall be the owner, holder or reinsurer of the mortgage, or during say time the Secretary is obligated to insure a mortgage on the mortgaged property:

1. Owners, except as limited by paragraph 17 hereof, assume and agree to make promptly all payments due under the note and mortgage.

2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgage or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Secretary of an amount equal to $920.95 per month unless a different date or amount is approved in writing by the Secretary.

Such funds, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the

United States of America shall at all times be under the control of the mortgages. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements, and mechanical equipment of the project or for say other purpose, may be made only after receiving the consent in writing of the Secretary. In the event of a default in the terms of the mortgage, pursuant to which the loan has been accelerated, the Secretary may apply or authorize the application of the balance in such fund to the amount due the mortgage debt as accelerated.

(b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other

method of establishing and maintaining the fund is approved in writing by the Secretary.

3. Real property covered by the mortgage and this agreement is described in Schedule A attached hereto.

(This paragraph 4 is not applicable to cases insured under Section 232).

4. (a) Owners shall make dwelling accommodation and services of the project available to occupants at charges not exceeding those established in accordance with a rental schedule approved in writing by the Secretary. Accommodations shall not be rented for a period of less than thirty (30) days, or, unless the mortgage is insured under Section 231, for more than three years. Commercial facilities shall be rented for such and upon terms as approved by the Secretary. Subleasing of dwelling accommodations, except for subleases of single dwelling accommodations by the tenant thereof, shall be prohibited without prior written approval of Owners and the Secretary

and any case shall so provide. Upon discovery of any unapproved sublease, Owners shall immediately demand cancellation and notify the Secretary thereof.

(b) Upon prior written approval by the Secretary, Owners may charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between the tenant upon and the Owner for any facilities and/or services which may be furnished by the Owner or others to such tenant upon his request, in addition to the facilities and services included in the approved rental schedule.

(c) The Secretary will at any time entertain a written request for a rent increase properly supported by substantiating evidence and within a reasonable time shall:

(i) Approve a rental schedule that is necessary to compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than income taxes) and operating and maintenance cost over which

Owners have no effective control, or

(ii) Deny the increase stating the reasons therefor.

5. (a) If the mortgage is originally a Secretary-held purchase money mortgage, or is originally endorsed for insurance under any Section other than Sections 231 or 232, Owners shall not in selecting tenants discriminate against any person or persons by reason of the fact that there are children in the family.

6. Owners shall not without the prior written approval of the Secretary:

(a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property.

(b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds except from surplus cash, except for reasonable operating expenses and necessary repairs.

(c) Convey, assign, or transfer any beneficial interest in any trust holding title to the property, or the interest of any general partner in a partnership owning the property, or any right to manage or receive the rents and profits from the mortgaged property.

(d) Remodel, add to, reconstruct, or demolish any part of the mortgaged property or subtract from any real or personal property of the project.

(e) Make, or receive and retain, any distribution of assets or any income of any kind of the project except surplus cash and except on the following conditions:

(1) All distributions shall be made only as of and after the end of a semiannual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction;

(2) No distribution shall be made from borrowed funds, prior to the completion of the project or when there is any default under this Agreement or under the note or

mortgage;

(3) Any distribution or any funds of the project, which the party receiving such funds is not entitled to retain hereunder, shall be held in trust separate and apart from any other funds; and

(4) There shall have been compliance with all outstanding notices of requirements for proper maintenance of the project.

(f) Engage, except for natrual persons, in any other business or activity, including the operation of any other rental project, or incur any liability or obligation not in connection with the project.

(e) Require, as a condition of the occupancy or leasing of any unit in the project any consideration or deposit other than the prepayment of the first month's rent to guarantee the performance of the covenants of the lease. Any funds collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall

at all times equal or exceed the aggregate of all outstanding olbigations under said account.

(h) Permit the use of the dwelling accommodations or nursing facilities of the project for say purpose except the use which was originally intended, or permit commercial use greater than that originally approved by the Secretary.

7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. In the event all or say of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms of insured mortgage.

8. Owners shall not file any petition in bankruptcy or for a receiver or in insolvency or for reorganization or composition, or make any assignment for the benefit of creditors or to a trustee for creditors, or

permit an adjudication in bankruptcy or the taking possession of the mortgaged property or any part thereof by a receiver or the seizure and sale of the mortgaged property or any part thereof under judicial process or pursuant to any power of sale, and fail to have such adverse actions set aside within forty-five (45) days.

9. (a) Any management contract entered into by Owners or any of them involving the project shall contain a provision that, is in the event of default hereunder, it shall be subject to terminnation without penalty upon written request by the Secretary. Upon such request Owners shall immediately arrange to terminate the contract within a period of not more than thirty (30) days and shall make arrangements satisfactory to the Secretary for continuing proper management of the project.

(b) Payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies, or materials in the area where the services,

supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

(c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating therto shall at all times be maintained in reasonable condition for proper audit and subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by the Secretary or his duly authorized agents.

(d) The books and accounts of the operations of the mortgaged property and of the project shall be kept in accordance with the requirements of the Secretary.

(e) Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual

financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.

(f) At the request of the Secretary, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answer to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage.

(g) All rents and other receipts of the project shall be deposited in the name of the project in a bank, whose deposits are insured by the F.D.I.C. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for expenses of the

project or for distributions of surplus cash as permitted by paragraph 6(e) above. Any Owner receiving funds of the project other than by such distribution of surplus cash shall immediately deposit such funds in the project bank account and failing so to do in violation of this agreement shall hold such funds in trust. Any Owner receiving property of the project in violation of this Agreement shall immediately deliver such property to the project and failing so to do shall hold such property in trust. As such time as the Owners shall have lost control and/or possession of the project, all funds held in trust shall be delivered to the mortgagee to the extent that the mortgage indebtedness has not been satisfied.

(h) If the mortgage is insured under Section 232:

1. The Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to operate the

project as a nursing home and shall not lease all or part of the project except on terms approved by the Secretary.

2. The Owner shall suitably equip the project for nursing home operations.

3. The Owners shall execute a Security Agreement and Financing Statement (or other form of chattel lien) upon all items of equipment, except as the Secretary may exempt, which are not incorporated as security for the insured mortgage. The Security Agreement and Financing Statement shall constitute a first lien upon such equipment, except as the Secretary amy exempt, which are not incorporated as security for the insured mortgage. The Security Agreement and Financing Statement shall constitute a first lien upon such equipment and shall run in favor of the mortgagee as additional security

for the insured mortgagee.

4. No litigation seeking the recovery of a sum in excess of $3,000 nor any action for specific performance or other equitable relief shall be instituted nor shall any claim for a sum in excess of $3,000 be settled or compromised by the Owners unless prior written consent thereto has been obtained from the Secretary. Such consent may be subject to such terms and conditions as the Secretary may prescribe.

(i) If mortgagee is insured under Section 231, Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to operate the project as housing for the elderly.

10. Owners will comply with the provisions of any Federal, State, or local law prohibiting discrimination in housing on the grounds of race, color, creed, or national origin, including Title VI of the

Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241), all requirements imposed by or pursuant to the Regulations of the Department of Housing and Urban Development, (24 CRF, Subtitle A, Part 1) issued pursuant to that title, and regulations issued pursuant to Executive Order 11063.

11. Upon a violation of any of the above provisions of this Agreement by Owners, the Secretary may give written notice, thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreemeent, or such other addresses as may subsequently, upon appropriate written notice thereof to the Secretary, be designated by the Owners as their legal business address. If such violation is not connnected to the satisfaction of the Secretary within thirty (30) days after the date such notice is mailed or within such further time as the Secretary

determines necessary to correct the violation, without further notice the Secretary may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Secretary may:

(a)(i) If the Secretary holds the note - declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage;

(ii) If said note is not held by the Secretary - notify the holder of the note of such default and request holder to declare a default under the note and mortgage, and holder after receiving such notice and request, but not otherwise, at its option, may declare the whole indebtedness due, and thereupon proceed with foreclosure of the mortgage, or assign the note and mortgage to the Secretary as provided in the Regulations;

(b) Collect all rents and charges in

connection with the operation of the project and use such collections to pay the Owner's obligation under this Agreement and under the note and mortgage and the necessary expenses of preserving the property and operating the project;

(c) Take possession of the project, bring any action necessary to enforce any rights of the Owners growing out of the project operation, and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners again are in a position to operate the project in accordance with the terms of this Agreement and in compliance with the requirements of the note and mortgage;

(d) Apply to say court, State or Federal, for specitic performances of this Agreement, for an injunction against say violation of the Agreement, for the appointment of a review to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to to the Secretary arising from a default under say of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

12. As security for the payment due under this Agreement to the reserve fund for replacements, and to secure the Secretary because of his liability under the endorsement of the note for insurance, and as security for the other obligations uncer this Agreement, the Oweners respectively assign, pledge and mortgage to the Secretary their rights to the rents, profits, income and charges of whatsoever sort which they may receive or be entitled to receive from the

operation of the mortgage property, subject, however, to any assignment of rents is the insured mortgage referred to herein. Until a default is declared under this Agreement, however, permission is granted to Owners to collect and retain under the provision is terminated as to all rents due or collected thereafter.

13. As used in this Agreement the term:

(a) "Mortgage" includes "Deed of Trust", "Chattel Mortgage", and say other security for the note identified herein, and endorsed for insurance or held by the Secretary;

(b) "Mortgages" refers to the holder of the mortgage identified herein, its successors and assigns;

(c) "Owners" refers to the persons named in the first paragraph hereof and designated as "Owners, their successors, heirs and assigned";

(iii) All obligation of the project other than the insured mortgage unless funds for payment are set aside or deferment of payment has been approved by the Secretary; and

(2) the segregation of:

(i) An amount equal to the aggregate of all special funds required to be maintained by the project;

(ii) All tenant security deposits held;

(g) "Distribution" means any withdrawal or taking of cash or any assets of the project, including the segregation of cash or assets for subsequent withdrawal within the

limitations of Paragraph 6(e) hereof, and excluding payment for reasonable expenses incident to the operation and maintenance of the project.

(h) "Default" means a default declared by the Secretary when a violation of this Agreement is not corrected to his satisfaction within the time allowed by this Agreement or such further time as may be allowed by the Secretary after written notice;

(i) "Section" refers to Section of the National Housing Act, as amended.

14. This instrument shall bind, and the benefits shall inure to, the respective Owners, their heirs, legal representatives, executors, administrators, successors, in office or interest, and assigns,

and to the Secretary and his successors so long as the contract of mortgage insurance continues in effect, and during such further time as the Secretary shall be the owner, holder, or reinsurer of the mortgage, or obligated to reinsure the mortgage.

15. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

16. The invalidity of any clause, part or provision of this Agreement shall not affect the validity or

the remaining portions thereof.

17. The following Owners: BROOKSIDE LIMITED PARTNERSHIP

do not assume personal liability for payments due under the note and mortgage, or for the payments to the reserve for replacements, or for matters not under their control, provided that said Owners shall remian liabile under this Agreement only with respect to the matters hereinafter stated; namely:

(a) for funds or property of the projedt coming into their hands which, by the provisions hereof, they are not entitled to retain: and

(b) for their own acts and deeds or acts and deeds of other which have authorized in violation of the provisions hereof.

(To be executed with formalities for recording a deed to real estate)

18 Owners agree that they will extend a preference or priority of occupancy to those families or persons who shall have certificates of eligibility or are determined to be displaced families pursuant to the National Housing Act, and such preferred applicants shall be given priority in original admission to the Project and in their placement on a waiting list to be maintained by the owner.

to those families or persons who shall have certificates of eligibility or are determined to be displaced families pursuant to the National Housing Act, and such preferred applicants shall be given priority in original admission to the Project and in their placement on a waiting list to be maintained by the owner.

COMMONWEALTH OF PENNSYLVANIA)
)SS:
COUNTY OF ALLEGHENY)

BE IT REMEMBERED, that on this 31st day of August, 1977, before me, the subscriber, a Notary Public of the Commonwealth of Pennsylvania for the County of Allegheny, personally appeared ELIZABETH M. BEHREND and MARK B. ARONSON, two of the General Partners of the Brookside Limited Partnership, who, I am satisfied, are the persons who have signed the within instrument; and I having first made known to them the contents thereof, they thereupon acknowledged that they signed, sealed, and delivered the said instrument as General Partners of said Lim-

ited Partnership; that the within instrument is the voluntary act and deed of said Limited Partnership made by virtue of authority from its Partnership Agreement.

_____

A Notary Public of the Commonwealth of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BE IT REMEMBERED, that on this 12th day of October, 1977, before me, the subscriber, a Notary Public of the Commonwealth of Pennsylvania appeared Chester J. Sayre, who, I am satisfied, is an authorized agent of the Federal Housing Commissioner, the party mentioned in the within instrument, to whom I first made known the contents thereof, and he thereupon acknowledged that he signed, sealed and delivered the same for and in behalf of said Federal Housing Commissioner as his voluntary act and deed,

for the uses and purposes therein expressed.

A Notary Public of the Commonwealth of Pennsylvania

Project No. 033-35061-LDC

BROOKSIDE APARTMENTS

Property Description

All that certain, piece, parcel or tract of land situate in the Township of White, County of Beaver and Commonwealth of Pennsylvania, being more particularly bounded and described as follows, to wit:

Beginning at a concrete monument marking the easterly right-of-way line of Twenty Sixth Avenue and the northerly terminus of the same said Avenue having a right-of-way width of 40 feet and being identified as Township Road No. 127, said monument being located on the line dividing land of Mark B. Aronson, et al., from land of Edward A. Sahli, Jr.; thence by said dividing line North 88° 00' 00" East, a distance of 740.00 feet to a point; thence by other land of Mark B. Aronson, et al., the following courses and distances, South 12° 23' 17" West, a distance of 151.26 feet to a point; thence South 27° 42' 00" West, a

distance of 180.00 feet to a point; thence South 42° 42' 00" West, a distance of 200.00 feet to a point; thence South 57° 42' 00" West, a distance of 542.96 feet to a point on the easterly right-of-way line of said Avenue, North 2° 18' 00" West, a distance of 718.98 feet to a concrete monument at the place of beginning. Containing an area of 8.025 Acres in accordance to a plan of survey of said land prepared by Daniel C. Baker, Registered Professional Engineer, dated October 5, 1976.

No. 82-933

In the Supreme Court of the United States

OCTOBER TERM, 1982

BROOKSIDE LIMITED PARTNERSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-933

BROOKSIDE LIMITED PARTNERSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)[1]

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 14-19) that the Court of Claims erred in holding that construction inspections performed by the Department of Housing and Urban Development (HUD) on a housing project for which HUD was the mortgage insurer created no implied-in-fact contract for the benefit and protection of petitioner, the mortgagor.

1. Petitioner is the owner and developer of a housing project in Beaver Falls, Pennsylvania, known as "Brookside Apartments" (Pet. App. 24). Construction of the project was financed by the Mellon Bank, N.A., which secured its

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[1]Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the new United States Court of Appeals for the Federal Circuit. See Federal Court Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

loan by a mortgage executed by petitioner. Pursuant to Section 221(d)(4) of the National Housing Act of 1934, 12 U.S.C. (& Supp. V) 1715*l*(d)(4), HUD agreed on June 16, 1977, to insure the mortgage in the event petitioner defaulted (Pet. App. 24). As part of its agreement with the bank to insure the mortgage, HUD retained the right to inspect the construction project as it progressed, and to approve any payments to the contractor provided for in the construction contract between petitioner and the construction company (*id.* at 25-26). The agreement also provided that HUD would be paid a fee for making construction inspections and that the inspections performed by HUD "shall be only for the benefit and protection of the Secretary of Housing and Urban Development" (*id.* at 25).

2. Petitioner filed this action against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking damages for construction defects that the government failed to discover when it inspected the project. Petitioner contended that an implied-in-fact contract existed between HUD and petitioner, which obligated HUD to inspect the project for petitioner's benefit, and that HUD breached its agreement to inspect the project properly (Pet. App. 21-22).

The Court of Claims granted the United States' motion for summary judgment (Pet. App. 24-30). First, it pointed out that none of the contract provisions relied upon by petitioner were contained in agreements between petitioner and HUD (*id.* at 31). It also found that petitioner "offered no evidence which would indicate that a 'meeting of the minds' took place between it and [HUD]" regarding whether HUD's inspections of the project were for petitioner's benefit (*id.* at 34). Accordingly, the court concluded that HUD's right to inspect the project's construction and to approve payments was intended solely to protect HUD as the mortgage insurer, which the contract with the bank

expressly stated, and that inspection fees paid by petitioner to HUD were simply a cost of obtaining mortgage insurance (*id.* at 32, 35).[2]

3. The decision of the Court of Claims, which involves only the factual determination that petitioner and HUD had no "meeting of the minds" with regard to the purpose of HUD's inspections, is fully supported by the record and raises no issue warranting review by this Court. As the Court of Claims correctly noted, the only document making any reference to inspections expressly described the inspections as "only for the benefit and protection of [HUD]" (Pet. App. 31).[3] Since petitioner failed to present any contrary evidence that would create a dispute regarding the purpose of HUD's inspections, the Court of Claims properly granted summary judgment for the United States.[4]

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[2]The court noted that nothing had prevented petitioner from conducting its own inspections of its project or from obtaining compensation for defective workmanship by asserting a claim against the performance bond furnished by its contractor (Pet. App. 32).

[3]It is true, as petitioner notes (Pet. 13), that this language is found in an agreement between HUD and Mellon, to which petitioner was not a party. But as the Court of Claims pointed out, petitioner relied on the inspection and payment-approval provisions of that same document as the basis for HUD's alleged duty to inspect for petitioner's benefit (Pet. App. 28). The court correctly reasoned that in deciding whether an implied-in-fact contract existed between petitioner and HUD, it was proper to consider the entire HUD-Mellon agreement, and not just those portions that supported petitioner (*ibid.*).

[4]The issue in this case is wholly unrelated to the issue presented in *Block* v. *Neal*, cert. granted, No. 81-1494 (May 24, 1982), which involves a claim that the government is liable under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for negligent inspection of a house constructed with a Farmers Home Administration loan. Both the district court and the court of appeals rejected Neal's contract claims, *Neal* v. *Bergland*, 646 F.2d 1178, 1181 (6th Cir. 1981), and those rulings have not been challenged in this Court.

Petitioner asserts (Pet. 16-17) that the Court of Claims' interpretation of the contract was based on deference to the contract interpretation of HUD as a regulatory agency and not on principles of contract law. This argument is totally baseless. The court found nothing in the record from which to imply any agreement between petitioner and HUD whereby HUD undertook to act for petitioner's benefit and protection (Pet. App. 34-35). Nowhere did the court suggest that HUD's interpretation of the written contract was to be accorded more deference than petitioner's because of HUD's status as an administrative agency.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

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[5]Petitioner derives its novel view of the court's decision from the court's use of the term "Regulatory Agreement" to describe the contract between petitioner and HUD (Pet. App. 30). This phrase, which petitioner characterizes as a " 'slip' in the opinion, almost Freudian in nature" (Pet. 15), merely shows that the court referred to the contract (Pet. App. 58-86) by a shortened version of its full title, "Regulatory Agreement For Multi-Family Housing Projects," which incorporates HUD's regulations into the mortgage insurance agreement.

DOJ-1983-01

Reply Brief

No. 82-933

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BROOKSIDE LIMITED PARTNERSHIP, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

REPLY MEMORANDUM FOR BROOKSIDE LIMITED PARTNERSHIP

KENNETH W. BEHREND
1112 Frick Building
Pittsburgh, PA 15219
(412) 391-2515

REPLY MEMORANDUM FOR
BROOKSIDE LIMITED PARTNERSHIP

The Petitioner in this case claims interpretation of a construction contract by the Lower Court was based on an erroneous deference to treat HUD as a regulatory agency for purposes of contract construction rather than upon the principles of contract law. This is a case in which HUD was erroneously treated as a regulatory agency with respect to mortgage insurance commitments it issues in federally subsidized projects.

The improper characterization of HUD as a regulatory agency, with regard to its commitments for mortgage advancement, has been made by HUD, by the Court of Claims, and now by the Solicitor General. We have reproduced, at pages 58-88 of our Petition for Writ of Certiorari, a certain HUD document which HUD has misnomered as a "regulatory agreement" although, as a practical matter, it is not a regulatory agreement as HUD is not a regulatory agency and does not have the authority that a regulatory agency has to promulgate "regulatory

agreements". The Court of Claims characterized HUD's responsibility as regulatory in nature when it said:

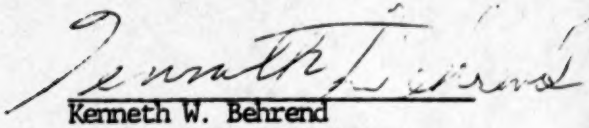
> "Finally, the owner/developer of the project must enter into a "regulatory agreement" with HUD, whereby the owner/developer agrees to comply with certain HUD regulations concerning the operation of the project after it is completed" (Pet. 30).

Now, opposing counsel has adopted the same misconception of HUD's role when he states that the "regulatory agreement from all these multi-family housing projects . . . incorporates HUD's regulations into a mortgage insurance agreement". (Memorandum at Page 5).

This case should be considered by Your Honorable Court to correct a widespread belief that HUD acts as a regulatory agency, with respect to its commitments for insurance of advances in housing projects.

Respectfully submitted,

BEHREND, ARONSON & MORROW



Kenneth W. Behrend
Attorney for Petitioner
1112 Frick Building
Pittsburgh, PA 15219
(412) 391-2515

February 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have served 3 true and correct photocopies of the foregoing document upon Rex E. Lee by placing the same in the U.S. Mail Postage Prepaid to him at his address.

Kenneth W. Behrend, Attorney for Petitioner

February 10, 1983